



October 12, 2000

Ms. Jennifer Lehmann  
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Attorneys and Counselors  
P.O. Box 200  
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OR2000-3939

Dear Ms. Lehmann:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 140053.

The San Antonio Development Agency ("SADA"), which your law firm represents, received three requests for information pertaining to an internal investigation of the executive director of SADA and related matters. The first request is for the preliminary report of the investigation. The second request is for the executive director's written rebuttal to the report. The third request is for records relating to the investigation and to certain employees of SADA, including the executive director and the individual whose complaints prompted the investigation. You inform us that SADA will release portions of the information sought by the third requestor. SADA seeks to withhold the investigation report and other requested information under sections 552.101, 552.103, 552.111, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

As all three requestors seek access to the investigation report and/or records relating to the investigation, we begin with your exceptions to the disclosure of the report and the related records. Section 552.103 of the Government Code, the "litigation exception," provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To sustain this burden, the governmental body must demonstrate that: (1) litigation is pending or reasonably anticipated and (2) the information in question is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

In this instance, you inform us that the employee whose complaint prompted the investigation has asserted grievances that might result in "Whistleblower" litigation. *See generally* Gov't Code ch. 554. Based on the possibility of such a Whistleblower claim, SADA seeks to withhold the preliminary investigation report, the executive director's rebuttal, and related records under section 552.103. In doing so, you do not provide either an explanation or any documentation of the specific grounds, status, or other material details of the employee's grievances. We have carefully considered your arguments. We note, however, that it is well-established that the mere chance of litigation is not enough to trigger the applicability of section 552.103. *See, e.g.,* Open Records Decision Nos. 518 at 5 (1989), 397 at 2 (1983), 361 at 2 (1983). We find that you have not demonstrated that the possibility that litigation may ensue is more than mere conjecture. Therefore, the information that you claim is related to anticipated litigation is not excepted from disclosure under section 552.103.

SADA also seeks to withhold the investigation report, the rebuttal, and related records under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." The purpose of section 552.111 is to protect from public disclosure advice, opinion, and recommendation used in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ). We determined that section 552.111 excepts only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5 (1993). A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (holding that personnel-related communications not involving policymaking were not excepted from public disclosure under section 552.111). However, a governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Additionally, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* Open Records Decision No. 615 at 5 (1993). But, if the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, that information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You inform us that the requested investigation report is the result of an employee's complaint about certain aspects of the executive director's conduct. You state that when the preliminary report was presented to the SADA board of commissioners, the board decided to continue the investigation and to extend its scope. You inform us that the board's decision was based on its dissatisfaction with the report and on its receipt of a second complaint by the same individual whose initial complaint prompted the investigation. You do not inform us, however, of any other or further matters that now are within the scope of the investigation. You state that the other records that SADA seeks to withhold under section 552.111, including the executive director's rebuttal, relate to the ongoing investigation of the complaints. You assert that the report "also assesses the climate of [SADA], states what factors the staff feels are contributing to the allegations being raised, makes conclusions[,] and states opinions with regard to the situation at the Agency." You argue that SADA should be permitted to withhold the preliminary report and the related records until the investigation is completed and a final report is designated for public disclosure. We have considered your arguments and have carefully examined the information in question. Based on our review of that information, we find that it pertains

entirely to a particular personnel matter, rather than to the formulation of policy or to an issue that affects SADA's policy mission. Accordingly, we conclude that the investigation report, rebuttal, and related records are not excepted from disclosure under section 552.111. *See City of Garland*, 22 S.W.3d at 359-64; Open Records Decision Nos. 626 at 4 (1994), 615 at 6 (1993).

We now address the records that you seek to withhold under sections 552.101 and 552.130 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Thus, section 552.101 protects information that another statute deems to be confidential. Section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification (Form I-9) "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). As release of the submitted Form I-9 under chapter 552 of the Government Code would be "for purposes other than for enforcement" of the referenced federal statutes, the Form I-9 is excepted from disclosure under section 552.101 in conjunction with section 1324a of title 8 of the United States Code. It may be released only for purposes of compliance with the federal laws and regulations governing the employment verification system.

The social security number of a an employee of a governmental body may be excepted from disclosure under section 552.117 of the Government Code or under section 552.101 in conjunction with federal law. Section 552.117 excepts from public disclosure information relating to the home address, home telephone number, and social security number of a current or former government employee, as well as information revealing whether the employee has family members. Section 552.117 requires you to withhold this information *if the current or former employee requested that this information be kept confidential under section 552.024*. *See* Open Records Decision Nos. 622 (1994), 455 (1987). However, you may not withhold this information in the case of a current or former employee who made the request for confidentiality under section 552.024 after the request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 at 5 (1989).

Alternatively, a social security number may be confidential under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), *if the social security number was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990*. *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security number in the submitted records is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, nor are we aware of any law enacted on or after October 1, 1990, that authorizes SADA to obtain or maintain a social security number. Therefore, we have no basis for concluding that the social security number in question was obtained or is maintained pursuant to such a statute and is therefore confidential under the federal law. We caution you, however, that chapter 552 of the

Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, prior to releasing a social security number, SADA should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

Lastly, we address your claim under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from [required public disclosure] if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;

(2) a motor vehicle title or registration issued by an agency of this state; or

(3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

Gov't Code § 552.130(a). In this instance, you seek to withhold New York State driver's license information. As that information does not relate to a Texas driver's license, it is not excepted from disclosure under section 552.130. *See* Gov't Code § 552.130(a)(1).

In summary, the submitted Employment Eligibility Verification (Form I-9) is confidential and must be withheld under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code. The social security number of a current or former employee of SADA may be excepted from disclosure under sections 552.024 and 552.117 or under section 552.101 in conjunction with federal law. The rest of the information that SADA seeks to withhold is not excepted from disclosure and must be released in its entirety.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general

have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

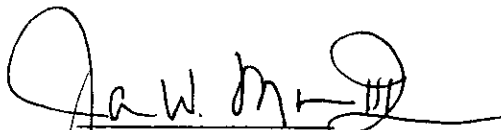
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Open Records Division

JWM/ljp

Ref: ID# 140053

Encl. Submitted documents

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